

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
November 3, 2009 Session

**BILL BURTON GREEN, JR. v. TERESA ANN GREEN**

**Appeal from the Chancery Court for Sumner County  
No. 2007D-278 Tom E. Gray, Judge**

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**No. M2008-02759-COA-R3-CV - Filed March 12, 2010**

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The wife in this divorce action contends the trial court erred in the amount of transitional alimony she was awarded, in denying her request for alimony *in futuro*, and in denying her request to recover attorney's fees. We affirm the trial court's decisions regarding transitional alimony and alimony *in futuro*. As for the issue of the wife's attorney's fees, we find the wife is entitled to recover some or all of the attorney's fees she incurred at trial and on appeal; we leave it to the discretion of the trial court to determine the amount of the fees for which the husband should be responsible.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed in Part; Reversed in Part and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Robert L. Jackson and Elizabeth A. Garrett, Nashville, Tennessee, for the appellant, Teresa Ann Green.

Helen Sfikas Rogers, Nashville, Tennessee, for the appellee, Bill Burton Green, Jr.

**OPINION**

Bill Burton Green, Jr. (Husband) and Teresa Ann Green (Wife) were married on April 3, 1992, in Hendersonville, Tennessee, where the parties lived throughout the duration of their 16-year marriage. This was the third marriage for Husband, the second marriage for Wife, and their marriage did not produce any children.

Both spouses worked throughout the marriage. Wife had a part-time job at First Baptist Church of Hendersonville, and Husband worked in the field of fire protection, eventually starting his own business, Green Fire Protection, Inc., in October 2005.

On July 30, 2007, Husband filed for divorce on the grounds of inappropriate marital conduct and irreconcilable differences. Wife filed an Answer and Counter Complaint alleging that Husband was guilty of inappropriate marital conduct and that irreconcilable differences had arisen in the marriage. Prior to trial, the parties entered an Agreed Order employing Richard Garrett to determine the fair market value of Green Fire Protection, Inc., which Husband started during the marriage.

A trial was held on October 23, 2008. The trial court issued a Final Decree of Divorce on November 19, 2008. The court declared the parties divorced, and as there are no children from this marriage, child support was not awarded.

In the division of property, the court's first assignment was to identify the parties' separate property. After identifying that each was entitled to keep his or her clothes, jewelry, and personal memorabilia, the court determined that a coin collection given to Husband by his father was his separate property and that Wife's two certificates of deposit totaling \$15,000 were her separate property. As for separate debts, the court determined that Husband was solely responsible for the debt on his daughter's vehicle and for his daughter's education loan, and that Wife was solely responsible for the debt on the Bank of America credit card that was in her name only.

As for the marital assets, the court awarded Husband complete ownership of Green Fire Protection, Inc., with a gross value of approximately \$367,000; the BMW vehicle he drove valued at \$55,835; bank accounts worth approximately \$1,800; a debt owed by John Long of \$10,000; one-half of the MFS Investment IRA, in the amount \$20,930; and part of the home furnishings. As for the marital debts, Husband was ordered to pay a First Tennessee Line of Credit of \$71,165 that encumbered the marital residence; an IRS debt for 2005 taxes of \$4,832; a debt of \$158,000 owed to Edwin Davis who provided a startup loan for Green Fire Protection, Inc.; debts owed on several credit cards totaling \$40,215; the debt owed on the BMW in the amount of \$71,260; and the fee for the business valuation by Richard Garrett in the amount of \$8,485. The net value of the marital assets awarded to Husband was approximately \$102,000.<sup>1</sup>

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<sup>1</sup>Husband was also held solely responsible for a debt the couple owed to Green Fire Protection, Inc. in the amount of \$72,797. We have not listed this as a debt, as Husband – who is the sole owner of Green Fire Protection, Inc. – may forgive the debt by listing it as compensation he received from the company. As

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The court awarded the following marital assets to Wife: the marital home, valued at \$345,000, with a net equity of \$120,000 due to two encumbrances, a first mortgage of \$154,131 and a line of credit of \$71,165; bank accounts worth approximately \$9,150; two cemetery plots valued at \$3,000; one-half of the MFS Investment IRA, in the amount of \$20,930; and part of the home furnishings. Wife was ordered to pay the following marital debts: the mortgage on the marital home in the amount of \$154,131, and a portion, \$5,169, of the couple's credit card debts. The present net value of marital assets awarded to Wife is approximately \$148,000, most of which is the net equity in the marital home.<sup>2</sup>

The trial court determined that Husband's income from Green Fire Protection was approximately \$110,950, the amount stated on Husband's 2007 W-2. The court found that Wife earned \$13,455 in 2007 as a part-time employee at First Baptist Church<sup>3</sup>; however, the court determined that Wife's earning capacity was approximately \$26,000 because, as she testified, she could work full time at the church for which she would be paid a gross annual salary of \$26,208.

As for Wife's request for various forms of alimony, the court determined that rehabilitative alimony was not appropriate as Wife did not need nor desire further training or education. The court also determined that Wife did not need alimony *in solido* in the form of attorney's fees. This decision was based on the trial court's finding that Wife had gross income of \$2,100 per month during the pendency of the divorce with no expenditures for shelter, utilities, gasoline, insurance, or home maintenance, and she could pay her attorney's fees. As for transitional alimony, the trial court determined that Wife was economically disadvantaged and that she needed, and Husband could afford to pay, \$2,100 per month for twelve months and, thereafter, \$1,500 per month for an additional eighteen months.

A Final Decree of Divorce was entered on November 19, 2008, and this appeal followed.

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<sup>1</sup>(...continued)

for the fee owing to Mr. Garrett, the trial court classified it as Husband's separate debt; however, we have chosen to list it under the marital debts, thus, it is included as part of husband's marital debt obligations.

<sup>2</sup>Wife is responsible for the first mortgage of \$154,131 and Husband is responsible for the line of credit in the amount of \$71,165. Although Husband was ordered to pay the line of credit, it remains an encumbrance on Wife's only substantial asset; thus, the net equity in the home is \$120,000. If Husband pays the debt as ordered, Wife's net equity in the home would increase to approximately \$191,000.

<sup>3</sup>Wife also received an additional \$12,000 a year as compensation for her work for Green Fire Protection; however, since Husband was awarded the business, Wife will no longer be working there.

## ANALYSIS

Wife presents three issues. She contends the transitional alimony she was awarded was insufficient; she contends she is entitled to long term alimony in addition to transitional alimony; and she contends she is entitled to recover her attorney's fees.<sup>4</sup> We will address these issues in turn.

### A.

A court may award rehabilitative alimony, transitional alimony, alimony *in futuro*, alimony *in solido*, or a combination of these. Tenn. Code Ann. § 36-5-121(d)(1). The purpose of rehabilitative support is to afford the disadvantaged spouse an opportunity to acquire or enhance job skills and/or education in order to enable him or her to be self-sufficient, *see Smith v. Smith*, 912 S.W.2d 155, 160 (Tenn. Ct. App. 1995); *Cranford v. Cranford*, 772 S.W.2d 48, 51 (Tenn. Ct. App. 1989), as distinguished from long-term spousal support, which serves the purpose of providing support to the spouse who is unable to achieve self-sufficiency. *Loria v. Loria*, 952 S.W.2d 836, 838 (Tenn. Ct. App. 1997). The purpose of temporary spousal support is to aid the disadvantaged spouse to become self-sufficient. *Bowie v. Bowie*, 101 S.W.3d 420, 424 (Tenn. Ct. App. 2003). The purpose of long-term spousal support is to aid the disadvantaged spouse when economic rehabilitation is not feasible in order to mitigate the harsh economic realities of divorce. *Id.* The General Assembly has stated a public policy preference for temporary, rehabilitative spousal support<sup>5</sup>

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<sup>4</sup>Husband contends on appeal that Wife did not request transitional alimony in her pleadings. This argument is without merit because she asserted in her Counter Complaint that she has a need and Husband “has the ability to pay alimony, both *pendente lite* and permanent,” and she also requested “such other, further, different, and general relief in which she may be granted as the justice of this cause may demand.” Though not artful, this is sufficient to qualify as a request for alimony, for which the trial judge must decide the type, amount, and duration of such award. Moreover, as the trial judge stated:

We have had testimony concerning ability to pay versus need . . . . And we've had testimony from the wife concerning alimony and the request for alimony, and we've had testimony from Mr. Green over the issue of alimony. And Judge Harris, senior judge sitting on the Court of Appeals by special designation, wrote from Tennessee Rules of Civil Procedure, “When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they've been raised in the pleadings.”

<sup>5</sup>“To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.” Tenn. Code Ann. § 36-5-121(d)(2).

over long-term support whenever appropriate. Tenn. Code Ann. § 36-5-121(d)(2); *Herrera v. Herrera*, 944 S.W.2d 379, 387 (Tenn. Ct. App. 1996); *Wilson v. Moore*, 929 S.W.2d 367, 375 (Tenn. Ct. App. 1996).

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Therefore, appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

There are no hard and fast rules for spousal support decisions. *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful balancing of the factors in Tenn. Code Ann. § 36-5-121(i)<sup>6</sup> and typically hinge on the unique facts and circumstances of the case. *See Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998); *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 628 (Tenn. Ct. App. 1994). While a trial court should consider all the relevant factors under the circumstances, the two most

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<sup>6</sup>The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

important factors are the need of the disadvantaged spouse and the obligor's ability to pay. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996).

B.

TRANSITIONAL ALIMONY AND ALIMONY *IN FUTURO*

The trial court correctly found Wife to be the economically disadvantaged spouse and that Husband was financially able to assist her. The trial court's decision followed its analysis of the statutory factors to be considered pursuant to Tenn. Code Ann. § 36-5-121. The fact that the trial court considered the statutory factors is evident from its memorandum opinion, which sets out specific findings as to the relevant factors.<sup>7</sup> One of the more relevant specific findings by the trial court was that "Wife is employed by First Baptist Church at Hendersonville where she works 22 hours per week earning \$12.60 per hour. She testified that she could work full time. Working 40 hours per week, she would gross annually \$26,208.00 or \$2,184.00 per month." The decision was also based on the fact the trial court placed limited obligations for marital debts on Wife, and heavy obligations on Husband.

Long term alimony in the form of alimony *in futuro* is to be awarded where rehabilitation is *not feasible* as compared to an award of transitional alimony where rehabilitation is *not necessary*. See Tenn. Code Ann. § 36-5-121(d)(4). Moreover, the General Assembly has declared that when rehabilitation is *not necessary* and when the "economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce," the court should award transitional alimony. Tenn. Code Ann. § 36-5-121(d)(4).

Wife worked at First Baptist Church of Hendersonville throughout the marriage and no evidence was presented that Wife needed or desired further training or education. Accordingly, rehabilitative alimony was not appropriate or necessary, as the trial court found. Thus, the issue is whether transitional alimony and/or alimony *in futuro* is appropriate.

The trial court determined that Wife was in need of transitional alimony, and the record before us supports the trial court's conclusion that Wife needs financial assistance to adjust to the economic consequences of the divorce. To assist Wife as she adjusts during the transitional period, the trial court awarded Wife a total of \$52,200 to be paid over a period of thirty (30) months as follows: \$2,100 per month for twelve (12) months and, thereafter, \$1,500 per month for a period of eighteen (18) months.

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<sup>7</sup>In its memorandum opinion, the trial court made findings as to the long-term nature of the marriage, the age and mental condition of the parties, the physical condition of the parties, and the distribution of the marital property.

Wife contends she should have received a larger award of transitional alimony given her needs in light of the standard of living the parties had established and given that Husband's earning capacity was higher than that determined by the trial court. We, however, find no error with the trial court's decision as to transitional alimony. As previously noted, Husband was obligated to pay a substantial portion of the marital debts, and the record reveals that the parties were living beyond their means; nevertheless, Husband's earning capacity is substantially greater than Wife's, she needs financial assistance to transition, and the record does not preponderate against the court's finding that Husband has the ability to pay the amount of transitional alimony awarded by the trial court.

Wife contends that the trial court erred in not awarding her long term alimony in addition to transitional alimony. Considering the facts and circumstances discussed above, the evidence does not preponderate against the trial court's decision to deny Wife's request for alimony *in futuro* in addition to transitional alimony.

We, therefore, affirm the trial court's decisions concerning transitional alimony and alimony *in futuro*.

#### C. ATTORNEY'S FEES

Wife contends the trial court erred by not awarding her the attorney's fees she incurred at trial. She also seeks to recover her attorney's fees incurred in this appeal.

An award of attorney's fees in a divorce action constitutes alimony *in solido*. *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001); *Herrera*, 944 S.W.2d at 390. Like other spousal support, an award of attorney's fees is available to either spouse. *See Herrera*, 944 S.W.2d at 390. An award of attorney's fees is to be based on a consideration of the factors set forth at Tenn. Code Ann. § 36-5-121(i), and is appropriate when the spouse seeking them does not have adequate funds to pay his or her legal expenses. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002).

The award of attorney's fees "is conditioned upon a lack of resources to prosecute or defend a suit in good faith." *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983). Accordingly, a spouse with adequate property and/or adequate income is not entitled to be compensated for his or her attorney's fees and expenses. *Koja v. Koja*, 42 S.W.3d 94, 98 (Tenn. Ct. App. 2000); *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn. Ct. App. 1997). The award of attorney's fees as alimony is appropriate when the divorce fails to provide the disadvantaged spouse with a revenue source, such as from the property division, or assets from which to pay his or her attorney's fees. *Yount*, 91 S.W.3d at 783. Moreover, an award of attorney's fees

is appropriate if the spouse received alimony as a result of the divorce but will be forced to deplete those funds, designed to sustain that spouse, in order to pay the attorney's fees. *See Batson v. Batson*, 769 S.W.2d 849, 862 (Tenn. Ct. App. 1988).

The record reveals that the net cash assets awarded to Wife totals only \$4,000 and assuming she is able to work full time at the church, her income will be a mere \$26,000 a year. In contrast, Husband's income in 2007 was reported on his W-2 as \$110,950 and, as the appraiser Mr. Garrett determined, Husband made approximately \$145,000 in 2008. Although Husband is obligated to pay a substantial portion of the marital debts, which benefits Wife, he has a substantially greater income while Wife has a modest income and liquid assets that are inadequate to pay all of her attorney's fees. Accordingly, we have determined that Wife does not have the ability to pay all of her attorney's fees and Husband has the ability to pay at least a portion of Wife's attorney's fees incurred at trial and on appeal. The amount of Wife's attorney's fees that is to be paid by Husband is left to the discretion of the trial court.

#### **IN CONCLUSION**

The judgment of the trial court is affirmed in part, reversed in part, and is remanded for further proceedings consistent with this decision. Costs of appeal are assessed against Husband.

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FRANK G. CLEMENT, JR., JUDGE